

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CLARENCE RISHER,

Plaintiff,

v.

ADECCO INC., et al.,

Defendants.

Case No. [19-cv-05602-RS](#)

**ORDER GRANTING MOTION TO
DISMISS AND OVERRULING
OBJECTION TO DISCOVERY
RULING**

I. INTRODUCTION

In this putative class action, plaintiff Clarence Risher alleges defendants Adecco, Inc. and Locutus, Inc. (formerly Mya Systems, Inc.) violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”) by sending text messages to his cell phone, soliciting him for possible employment through Adecco, which operates a job placement service. The operative fourth amended complaint advances three claims for relief. The first claim alleges defendants utilized an automatic telephone dialing system. Risher concedes, however, that in light of the Supreme Court’s decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), which applied a more restrictive construction of “autodialer,” his first claim for relief is not tenable and may be dismissed.

Defendants’ present motion does not challenge the second claim for relief, which asserts defendants sent the text messages notwithstanding the fact that Risher’s telephone number was listed on the National Do Not Call Registry. The only question presented by the motion to dismiss,

1 therefore, is whether text messages fall within the provisions of the TCPA prohibiting unsolicited
2 calls made using an “artificial or prerecorded voice.”

3 Risher also challenges a discovery order entered by the assigned magistrate judge. For the
4 reasons below, the motion to dismiss will be granted, and the objection to the discovery ruling will
5 be overruled.

6 7 II. BACKGROUND

8 Risher alleges that in 2008 he submitted information to Adecco’s job placement services
9 seeking employment in either a “data entry” position or as a “desktop support technician.” He was
10 not hired for either of those positions, and had no further contact with Adecco. Nearly 11 years
11 later, however, in 2019, Risher received a text message stating, “Hello Clarence, this is Mya from
12 Adecco. We’re hiring for Refurbisher roles, and I thought you might be interested. Do you have a
13 minute to chat via text? You can also reply ‘no more texts’.” Risher ignored the message. Some
14 hours later he received a further text message asking, “Hi Clarence! It’s Mya again. Are you free
15 to chat for a few minutes?”

16 “Mya,” was not a human being, but a “chatbot”—a computer program utilizing so-called
17 artificial intelligence to recognize a consumer’s responses and lead a conversation with an
18 individual in natural language by mimicking a human. Mya was developed and operated by
19 Locutus, under a contractual relationship with Adecco.

20 21 III. LEGAL STANDARDS

22 A complaint must contain “a short and plain statement of the claim showing that the
23 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). While “detailed factual allegations” are not
24 required, a complaint must have sufficient factual allegations to state a claim that is “plausible on
25 its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. v. Twombly*, 550 U.S. 544,
26 555, 570 (2007)). A claim is facially plausible “when the plaintiff pleads factual content that
27 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
28

1 alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). This standard asks for “more than a sheer
2 possibility that a defendant has acted unlawfully.” *Id.* The determination is a context-specific task
3 requiring the court “to draw on its judicial experience and common sense.” *Id.* at 679.

4 A motion to dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil
5 Procedure tests the legal sufficiency of the claims alleged in the complaint. *See Conservation*
6 *Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011). Dismissal under Rule 12(b)(6) may be
7 based on either the “lack of a cognizable legal theory” or on “the absence of sufficient facts
8 alleged under a cognizable legal theory.” *Id.* at 1242 (internal quotation marks and citation
9 omitted). When evaluating such a motion, the court must accept all material allegations in the
10 complaint as true and construe them in the light most favorable to the non-moving party. *In re*
11 *Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1140 (9th Cir. 2017).

12 As to Risher’s objection to the discovery order, a district court may modify a magistrate
13 judge’s ruling on a non-dispositive matter only if the order is “clearly erroneous” or “contrary to
14 law.” 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a); *Bahn v. NME Hospitals, Inc.*, 929 F.2d 1404,
15 1414 (9th Cir.1991).

16 17 IV. DISCUSSION

18 A. *Motion to dismiss*

19 In the absence of express consent, section 47 U.S.C. § 227(b)(1)(A)(iii) of the TCPA, and
20 its implementing regulations at 47 CFR § 64.1200(a)(2), prohibit non-emergency calls to cell
21 phones that are made “using any automatic telephone dialing system or an artificial or prerecorded
22 voice.” As noted, Risher agrees that his claim that defendants used an “automatic telephone
23 dialing system” cannot go forward. Risher also acknowledges that the text messages sent to him
24 were not a “voice” in the sense of audible, spoken, words. Risher contends, however, that the
25 messages had a “voice” in a metaphorical sense—indeed that the very intent of the Mya chatbot is
26 to create the impression of an interactive human “voice,” responding conversationally. Risher
27 further argues that the texts, although silent, represent the very type of automated, mass messaging
28

1 that TCPA was intended to prevent.

2 Risher’s position is not frivolous. As one court observed, “the policy of protecting
3 telephone privacy might be advanced by a prohibition on unwanted text messages” *Mina v.*
4 *Red Robin International, Inc.*, Case No. 20-cv-00612-RM-KLM (August 18, 2022, D. Col.). As
5 the *Mina* court went on to hold, however, “that is not what the TCPA currently does.” Rather, “in
6 common parlance, text messages simply are not considered ‘voices,’” and the statute should be
7 understood by the ordinary meaning of its words. *Id.*; *see also, Soliman v. Subway Franchisee*
8 *Advertising Fund Trust, Ltd.*, Case No. 3:19-cv-592 (July 18, 2022, D. Conn.) (“To be sure . . .
9 ‘voice’ can also be used metaphorically . . . [b]ut this use is less common and is typically used in
10 poetic or literary settings In normal English, an advertiser’s text message is not its ‘voice.’”)

11 *Soliman* further observed that interpreting “voice” metaphorically “is even less plausible
12 given that the Act bans ‘prerecorded voices.’ To ‘record’ is ‘[t]o convert (sound or visual scenes,
13 esp. television pictures) into permanent form.’ Record (def. 9c), Oxford English Dictionary. This
14 definition matches perfectly with the sound sense of ‘voice,’ but not with the metaphorical one.”

15 Risher’s third claim for relief, therefore, fails. Because this dismissal turns on the legal
16 conclusion that the text messages do not fall within the statutory language, it is not a pleading
17 defect that can be cured by amending to state additional or other facts. Risher has not suggested
18 otherwise. Accordingly, no leave to amend will be granted.

19 20 B. *Objection to discovery ruling*

21 Risher contends that the magistrate judge has erroneously limited his ability to obtain
22 certain documents from defendants—(1) a representative sample of the dialing lists/logs showing
23 text recipients who may be class members, (2) data and records related to any consent defense, and
24 (3) documents showing differences in the text messages. The crux of the dispute appears to be that
25 defendants have produced only information “specific to the text message campaign through which
26 Plaintiff received a text message,” whereas Risher wishes to represent “all individuals who were
27 sent text messages through Mya’s chat bot promoting Adecco’s job placements,” which he insists
28

1 requires discovery into other “campaigns” or candidate lists.

2 The magistrate judge, however, has not permanently closed the door on Risher’s ability to
3 obtain further discovery. Rather, in the order Risher challenges, the magistrate judge ruled that
4 defendants had adequately complied with her prior order, Risher’s assertions to the contrary
5 notwithstanding. The judge then expressly ordered the parties to engage in further meet and confer
6 discussions regarding, among other things, Risher’s “request for the total number of text
7 recipients.”

8 The order observed that the parties had failed to “tether their arguments to the Fourth
9 Amended Complaint,” and that those arguments provided “no context that identifies the problem
10 or suggests a solution.” Risher’s objection to the ruling insists the magistrate judge failed to
11 conduct any analysis under Fed. R. Civ. P. 26. The record is clear, however, that the magistrate
12 judge was appropriately focused on the questions of burden and relevance as directed by that rule
13 both at the time of the order Risher challenges, and when issuing the underlying prior order.
14 Indeed, the magistrate judge was careful to avoid deciding issues where the parties had not
15 provided sufficient information and clarity to permit a proper Rule 26 analysis. In directing further
16 meet and confer negotiations, the order noted, “[i]t is not the court’s job to guess at relevance or
17 burden.”

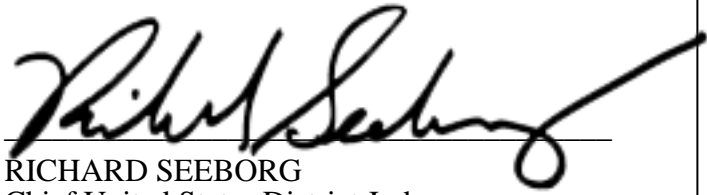
18 In short, Risher has failed to show that the magistrate judge’s ruling was clearly erroneous
19 or contrary to law. His objection is overruled.

V. CONCLUSION

The motion to dismiss the first and third claims for relief of the fourth amended complaint is granted. Defendants shall file an answer to the remaining claim for relief within 20 days of the date of this order. The objection to the magistrate judge’s discovery order is overruled.

IT IS SO ORDERED.

Dated: November 18, 2022


RICHARD SEEBORG
Chief United States District Judge

United States District Court
Northern District of California